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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11  
12 ALEC L., et al,

13 Plaintiffs,

14 v.

15 LISA P. JACKSON, in her official capacity  
capacity as Administrator of the United  
16 States Environmental Protection Agency,  
et al.,

17 Defendants.

Case No.: 4:11-cv-02203 EMC

**DEFENDANTS' REPLY IN SUPPORT OF  
THEIR MOTION TO DISMISS  
PURSUANT TO FED. R. CIV. P. 4(m) &  
12(b)(5)**

Date: Nov. 21, 2011

Time: 2 p.m.

Place: Courtroom 5, 17<sup>th</sup> floor

18 Defendants, LISA P. JACKSON in her official capacity as Administrator of the U.S.  
19 Environmental Protection Agency ("EPA"), KENNETH L. SALAZAR in his official capacity as  
20 Secretary of the U.S. Department of the Interior ("DOI"), THOMAS J. VILSACK in his official  
21 capacity as Secretary of the U.S. Department of Agriculture ("USDA"), GARY F. LOCKE in his  
22 official capacity as Secretary of the U.S. Department of Commerce ("Commerce"), STEVEN CHU  
23 in his official capacity as Secretary of the U.S. Department of Energy ("DOE"), and LEON E.  
24 PANETTA in his official capacity as Secretary of the U.S. Department of Defense (DOD"), file this  
25 Reply in connection with Defendants' previously-filed Rule 12(b)(5) motion to dismiss both the  
26 original "Complaint for Declaratory and Injunctive Relief" and the "First Amended Complaint for  
27 Declaratory and Injunctive Relief" filed by Plaintiffs ALEC L. et al., for failure to comply with the  
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1 service requirements of Fed. R. Civ. P. 4(i) & 4(m).

## 2 BACKGROUND

3 As set forth in Defendants' September 15, 2011 Motion to Dismiss Pursuant to Fed. R. Civ.  
4 P. 4(m) [Dkt. 15], Plaintiffs filed their original Complaint in this case on May 4, 2011 (Dkt. No. 1) –  
5 now more than 150 days ago – but failed to properly serve Defendants. Defendants also explained  
6 that although Plaintiffs filed their First Amended Complaint (Dkt. 4) on July 27, 2011, they never  
7 properly served that pleading on Defendants either.

8 Proper service is required. *See Hickory Travel Sys., Inc. v. TUI AG*, 213 F.R.D. 547, 551–52  
9 (N.D. Cal. 2003), stating: “A party must be properly served for the Court to obtain personal  
10 jurisdiction over that party.” When a defendant challenges service, “plaintiffs bear the burden of  
11 establishing that service was valid under Rule 4.” *Brockmeyer v. May*, 383 F.3d 798 (9<sup>th</sup> Cir. 2004).

12 Here, Plaintiffs' Opposition to Defendants' Motion to Dismiss was due September 29, 2011.  
13 Yet Plaintiffs failed to file an actual opposition to that motion, or a statement of non-opposition  
14 under Local Rule 7-3(b). In lieu of a formal response to the United States' motion, Plaintiffs'  
15 “response” consisted of merely a series [Dkt. 16-21] of “Proofs of Service” on the six federal agency  
16 heads named as Defendants in this litigation. Plaintiffs did not, however, file a Proof of Service  
17 showing that they had complied with the unambiguous and mandatory requirements for effective  
18 service on the United States set forth in Fed. R. Civ. P. 4(i). That rule, in relevant part, provides as  
19 follows:

20 Rule 4(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

21 (1) United States. To serve the United States, a party must:

22 (A) (i) deliver a copy of the summons and of the complaint to the United States attorney  
23 for the district where the action is brought – or to an assistant United States attorney  
24 or clerical employee whom the United States attorney designates in a writing filed  
25 with the court clerk – or  
(ii) send a copy of each by registered or certified mail to the civil-process clerk at the  
United States attorney's office;

26 (B) send a copy of each by registered or certified mail to the Attorney General of the United  
States at Washington, D.C.; and

1 (C) if the action challenges an order of a nonparty agency or officer of the United States, send  
2 a copy of each by registered or certified mail to the agency or officer.

3 (2) Agency; Corporation; Officer or Employee Sued in an Official Capacity. To serve a United States  
4 agency or corporation, or a United States officer or employee sued only in an official capacity, a  
party must serve the United States and also send a copy of the summons and of the complaint by  
registered or certified mail to the agency, corporation, officer, or employee.

5 As the Rule expressly provides, in cases such as this, where an officer or employee of a  
6 federal agency is sued in his or her official capacity, sufficient service requires not only that the  
7 plaintiff “send a copy of the summons and of the complaint by registered or certified mail to the  
8 agency, corporation, officer, or employee” – which Plaintiffs failed to show they did here – but also  
9 “serve the United States.” See Rule 4(i)(2). The latter responsibility – service on “the United States”  
10 – is satisfied only by complying with Rule 4(i)(1), which requires that plaintiffs deliver a copy of the  
11 summons and complaint to the United States Attorney for the district where the action is brought (or  
12 to an assistant United States Attorney or clerical employee whom the United States attorney  
13 designates in a writing filed with the court clerk) or (ii) send a copy of each by registered or certified  
14 mail to the civil-process clerk at the United States attorney’s office; and also send a copy of the  
15 summons and complaint each by registered or certified mail to the Attorney General of the United  
16 States at Washington, D.C.

17 Because Plaintiffs have failed to show that they have complied with the express service  
18 requirements of Rule 4(i), they have run afoul of Rule 4(m), which provides: “If a defendant is not  
19 served within 120 days after the complaint is filed, the court – on motion or on its own after notice to  
20 the plaintiff – must dismiss the action without prejudice against that defendant or order that service  
21 be made within a specified time.” Here, when Defendants filed their Motion to Dismiss, 134 days  
22 had elapsed without service since Plaintiffs had filed their Complaint. Since that motion was filed,  
23 another 20 days have elapsed without legally sufficient service on the United States, and without any  
24 formal response by Plaintiffs to the United States’ motion. Accordingly, the Complaint and the First  
25 Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(5), which provides for  
26 dismissal of a claim if service of process was not timely made in accordance with Rule 4 or was not  
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1 properly served in the appropriate manner. *See, e.g., Serban's Background Music v. Chynoweth*, No.  
2 05-1476, 2006 WL 2527955 (E.D. Cal., August 31, 2006). In that case, the magistrate recommended  
3 (which recommendation was adopted by the court) dismissal where the litigant failed to file a proof  
4 to show service of the petition on the U.S. Attorney's Office for the Eastern District of California  
5 and the U.S. Department of Justice, and also failed to file an opposition to the government's motion  
6 to dismiss. Citing Rule 4(m) and *Reynolds v. United States*, 782 F.2d 837, 838 (9th Cir. 1986), the  
7 magistrate judge stated: "If service of process is not accomplished within 120 days of filing an  
8 action, this Court is empowered to dismiss the action." *Id.*

9 Although Plaintiffs have never effected legally sufficient service on the United States and  
10 never responded to the United States' Motion to Dismiss, they moved this Court on September 28,  
11 2011 for a preliminary injunction [Dkt. 24] and calendared that motion for hearing on November 21,  
12 2011. This Court then issued an order [Dkt 54] rescheduling hearing on the United States' Motion to  
13 Dismiss for the same date and time as Plaintiffs' preliminary injunction hearing. Such scheduling  
14 puts the United States in the untenable position of having to respond to a preliminary injunction  
15 motion even though the United States has never been properly served and, thus, the Court lacks  
16 jurisdiction over the United States here.

17 Accordingly, Defendants request that the Court set aside Plaintiffs' preliminary injunction  
18 motion and any briefing schedule relating thereto, and any case management deadlines, until the  
19 Court has an opportunity to resolve Defendants' Motion to Dismiss.

20 In addition, the United States notes that under Fed. R. Civ. P. 12(a)(2), the United States is  
21 afforded 60 days after proper service to answer or otherwise respond to any complaint. In the event  
22 that this case is not immediately dismissed and Plaintiffs are allowed additional time to effect proper  
23 service, the United States requests that (a) the case management conference be scheduled after the  
24 United States has not only been served but has answered or otherwise responded to the Complaint  
25 and sufficient time has elapsed for the parties to conduct discussions relating to ADR and case  
26 management issues, and (b) Plaintiffs' be required to serve the Complaint on the United States prior  
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1 to re-filing their preliminary injunction motion if they wish to pursue such relief.

2 Dated: October 7, 2011

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4  
5 *s/ Martin F. McDermott*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of October, 2011, a copy of the foregoing  
DEFENDANTS' REPLY REGARDING DEFENDANTS' MOTION TO DISMISS PURSUANT  
TO FED. R. CIV. P. 4(m) and 12(b)(5) were filed and served through the Court's CM/ECF system.

s/ Martin F. McDermott  
Trial Attorney, U.S. Department of Justice